

Memorandum

TO: Members, Clark Fork Basin Water Management Task Force
FROM: Gerald Mueller, Project Coordinator
SUBJECT: Summary of the July 12 2004 Meeting
DATE: July 21, 2004

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Eugene Manley	Granite County
Harvey Hackett	Bitter Root Water Forum
Fred Lurie	Blackfoot Challenge
Matt Clifford	Clark Fork Coalition
Jim Dinsmore	Upper Clark Fork River Basin Steering Committee
Elna Darrow	Flathead Basin Commission
Phil Tourangeau	Confederated Salish and Kootenai Tribes
Holly Franz	PPL Montana
Gail Patton	Sanders County
Marc M. Spratt	Flathead Conservation District
Verdell Jackson	Legislature
Holly Franz	PPL Montana LLC

Staff:

Judy Edwards	Montana Consensus Council
Gerald Mueller	Montana Consensus Council (MCC)
Mike McLane	Montana Department of Natural Resources and Conservation (DNRC)

Public

Vicki Watson

Meeting Goals:

- Update the draft water management plan status
- Report on the Thompson River Lumber Company Water Rights Permit Application
- Discussion of the State-USFS Water Rights Compact Negotiations
- Discuss Implementing Legislation
- Prepare for Public Meetings
- Review Remaining Activities
- Public comments

Update the Draft Water Management Plan Status

Gerald Mueller and Mike McLane reported on the status of the draft water management plan. Chapters 1,2, 4-11 are complete and have been emailed to Mr. McLane for posting on the Task Force web page, www.dnrc.state.mt.us/clarkfrkbasincover.htm. Mr. Mueller passed out copies of these chapters. Mr. McLane passed out his recent edit of chapter 3 reflecting the input of Marc Spratt. Mr. Mueller will complete the appendices and will edit chapter 3 so that they too can be posted on the web site prior to the first public meeting on July 17. Mr. McLane indicated that his goal is to have DNRC post the completed plan prior to July 17.

Thompson River Lumber Company Water Rights Permit Application

Gerald Mueller passed out a copy of the objection filed by Avista to the water rights permit application filed by the Thompson River Lumber Company (TRLC). The local Thompson Falls newspaper apparently reported in error that Avista did not pay the required filing fee so that the status of the objection was in doubt. Avista had sent the fee along with its objection to the Helena office of DNRC. Avista's objection made two basic points: the applicant's diversion of water from the Clark Fork River would diminish water available for Avista and the applicant proposes to reduce and cease diverting water if a "legitimate, non-selective" water rights call is made by a downstream senior water right holder. Avista believes that the restriction to a "legitimate, non-selective" call does not conform to existing law.

Mr. Mueller stated that he had discussed Avista's objection with Steve Fry, who was unable to attend today's meeting because he is in Washington DC at a meeting involving FERC and EPA concerning the removal of the Milltown Dam. According to Mr. Fry, Avista has not yet reviewed a ground water application made by TRLC, so Avista has not made a decision about an objection to it. Task Force discussion indicated that processing an objection to a surface or ground water permit application would likely take DNRC over a year.

The Task Force instructed Mr. Mueller to visit with Steve Fry to determine if Avista's action constitutes a change in policy so that the Company will be objecting to all future upstream water right applications.

Holly Franz stated that PPL Montana does not intend to consider changes to its existing policy of not objecting to new permit applications until after the Task Force adopts the final water management plan.

State-USFS Water Rights Compact Negotiations

Mr. Mueller passed out copies of a February 9, 2004 letter provided by Faye Bergan, the chief legal counsel for the Reserved Water Rights Compact Commission. Ms. Bergan supplied the letter in response to Mr. Mueller's request for information about USFS proposed statutory changes to implement a compact with the State. The letter did not include any USFS proposed statutory changes, but only outlined the settlement package under discussion as of February 2004.

Plan Implementing Legislation

Mr. Mueller led a discussion of his May 21, 2004 memo on Plan recommendations that may require implementing legislation. See Appendix 1. The Task Force requested that Mr. Mueller visit with appropriate DNRC personnel to begin discussing possible legislation.

A member of the public offered a suggestion relative recommendation 7-6. This recommendation proposes a statutory change to allow judge to award attorney fees to a private party bringing a successful lawsuit to halt an illegal use of water, i.e. when water is diverted without a water use permit or existing water right. The suggestion was to allow the judge to award attorney fees to the winner in the law suit. Allowing the prevailing party the possibility of receiving attorney fees would tend to discourage

frivolous litigation, while enabling existing rights holders access to the courts to protect themselves against clearly illegal diversions.

Draft Plan Meeting Preparation

Gerald Mueller presented and the Task Force discussed hard copies of the Power Point Presentation which he is planning to present at the Hamilton, Ronan, Kalispell, Deer Lodge, and Thompson Falls meetings. Task Force members suggested adding a slide near the beginning defining a water right and two others at the end that would explain the schedule for adopting the plan and ask the audience three questions:

1. Do you see a need for local and state water use planning?
2. Are there other water management problems that the plan should address?
3. What are the major needs for water over the next 50 years?

A member also suggested that we provide 3X5 cards to public meeting participants so they can write comments and questions and pass them to us at the end of the meeting.

Remaining Activities

Gerald Mueller passed out and the Task Force confirmed the following list of remaining activities regarding the water management plan.

Activity	Completion Date
1. Complete the draft plan	July 13
2. Post the draft plan on the DNRC web site	July 15
3. Conduct the draft plan public meetings	July 17 - 28
4. Review the draft plan comments	August 2
5. Revise and circulate the revision to the Task Force	August 9
6. Adopt the final plan	August 16
7. Post the final plan on the DNRC web site	August 23
8. Print the final plan	September 13
9. Submit final plan to the Governor, Legislature, and DNRC Director	September 15

Next Meeting

The next meeting is scheduled for Monday, August 2, 2004 at 9:00 a.m. in the DFWP conference room at 3201 Spurgin Road in Missoula. The agenda will include a discussion of comments made during the public meetings. The plan may be revised in light of these comments and a final plan will be drafted for Task Force approval at an August 16, 2004 meeting, also at 9:00 a.m. in the DFWP conference room at 3201 Spurgin Road in Missoula.

Appendix 1 Memorandum

Date: May 21, 2004
To: Clark Fork Task Force
From: Gerald Mueller
Re: Water Management Plan Topics That Might Need Legislation

The following recommendation options may require legislation and/or funding to implement. We will discuss these items at the June 7, 2004 Task Force meeting.

Chapter 7

- \$ Establish a reasonable goal for achieving enforceable water rights decrees in the Clark Fork Basin such as 5 years.
- \$ Provide additional resources for the adjudication process, including:
 - S Additional funding for the Water Court and the DNRC; and
 - S Re-prioritize DNRC's existing resources to focus on the adjudication.
- \$ Implement the Water Court's on-motion or an institutional objector to improve the accuracy of the adjudication.
- \$ Require DNRC to administer a program that trains, selects, and evaluates water commissioners and changes the way water commissioners are funded so that all rights holders under a decree share the costs according to their share of the total basin water rights rather than just those receiving water.
- \$ Increase the state's authority and resources to investigate and enforce water rights.
- \$ Change Montana law to allow a judge to award attorney fees to a private party bringing an action for an illegal use of water. See draft legislation in Appendix 1 below.
- \$ Require DNRC to initiate administrative rule making to establish criteria for objecting to water rights permit and change applications that increase the burden on applicants while reducing the burden on existing rights holders.

Chapter 8

- \$ Strengthen the position of water commissioner by increasing pay and benefits and changing the way they are funded by imposing a minimum fee on all rights holders in the basin for which the commissioners are allocating water.
- \$ Change water rights permitting requirements and process to by requiring DNRC to:
 - S Evaluate cumulative impacts before granting surface or ground water permits;
 - S Assess the effects of a proposed water use on the quantity and quality of the source of supply for existing beneficial uses; and
 - S Assess the availability and feasibility of using low-quality water for the purpose for which the permit application has been made.
- \$ Regarding ground water:
 - S Eliminate the permit exemption for new wells producing less than 35 gpm
 - S Adopt a legally defensible definition of the hydrologic connection between surface and ground water; and
 - S Require an applicant for a ground water permit to provide information demonstrating the nature of the surface-ground water connection.

Appendix 1

85-2-114. Judicial enforcement. (1) If the department or a person ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may, after reasonable attempts have failed to obtain voluntary compliance as provided in subsection (5), petition the district court supervising the distribution of water among appropriators from the source to:

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(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use;

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference; or

(c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

(2) A person successful in enjoining an illegal use of water must be awarded reasonable attorneyfees by the district court against the party successfully enjoined.

(3) Upon the issuance of an order or injunction, the department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of the water.

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(4) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin the waste, unlawful use, interference, or violation. The county attorney may prosecute under 85-2-122(1) or bring an action under 85-2-122(2) without being requested to do so by the department. The attorney general and a county attorney are subject to the voluntary compliance provisions of subsection (5). (5) The department shall attempt to obtain voluntary compliance through warning, conference, or any other appropriate means before petitioning the district court under subsection (1). The attempts to obtain voluntary compliance under this subsection must extend over a period of at least 7 days and may not exceed 30 working days.

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History: En. Sec. 33, Ch. 452, L. 1973; R.C.M. 1947, 89-897; amd. Sec. 32, Ch. 697, L. 1979; amd. Sec. 1, Ch. 677, L. 1991; amd. Sec. 1, Ch. 457, L. 2001.